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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

NO. 123.

KNOXVILLE WATER COMPANY, APPELLANT,

VS.

MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, ET AL.,

BRIEF IN BEHALF OF APPELLEES.

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IN THE

SUPREME COURT OF THE UNITED STATES

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KNOXVILLE WATER COMPANY,
Appellant

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, et al,
Appellees

No. 123

BRIEF ON BEHALF OF APPELLEES.

Statement of the Case.

This is a suit to enjoin the City of Knoxville from constructing and operating a municipal water plant. Complainant's claim for this relief is based upon a contract entered into between it and the City on July 1, 1882, by the terms of which it is insisted, Complainant was vested with the exclusive right to furnish said City and its inhabitants with water for a period of thirty years from August 1st, 1883. The particular clause of the contract which gives rise to this contention is as follows, viz.: "the City further obligates itself not to grant to any "other person or corporation, any contract, or privilege to furnish water "to the City of Knoxville, or the privilege of erecting upon the public "streets, lanes or alleys, or other public grounds for the purpose of "furnishing said City or the inhabitants thereof with water for the "full period of thirty years from the 1st day of August, 1883, provided "the Company comply with the requirements and obligations imposed "and assumed by them under and by virtue of this agreement." (Rec., p. 37).'

The case stands upon Bill and Demurrer and its salient features

are as follows: On March 31, 1903, the Legislature of Tennessee passed an act which was approved by the Governor on April 3, 1903, authorizing the City of Knoxville to own and operate a system of water works and to issue bonds for that purpose. (Rec., p. 74).

By the terms of this act the City might issue, for the purpose of purchasing or constructing water works, not exceeding $750,000.00 of interest-bearing coupon bonds. The entire work of purchasing, constructing, operating and maintaining said water works was vested in a Board of five Commissioners, who were authorized and directed to obtain from the Knoxville Water Company (the Complainant) a proposition for the sale of its plant and franchises to the City, and also to secure plans, specifications and estimates of the cost of the construction of a new system of water works, and submit the whole to the City Council for its consideration. No contract for either the purchase of the old water works or the construction of new water works should be made until the City Council should authorize it after it had been ratified by a vote of the people. (Rec., p. 76). In pursuance of this Act, the Commission which had been appointed by virtue of its provisions, on September 28, 1903, addressed a letter to the Knoxville Water Company asking if it would sell its plant and franchises, and if so, at what price and upon what terms. (Rec., p. 14). The Complainant replied to this letter on October 19, 1903, stating that it recognized the right of the City to purchase Complainant's plant, provided it was done under the terms and in the manner set out in the contract of July 1, 1882. (Rec., p. 15). It should be here stated that said contract provides that at the expiration of fifteen years from the completion of the water works, the City should have the right to buy the same by negotiations if thus the terms should be agreed upon, or, if not, then for a consideration to be determined by appraisers; that if said purchase was not made at the end of fifteen years, it might be made upon the same terms and conditions at the end of each year thereafter upon giving notice, etc. (Rec., pp. 38-39). On March 22, 1905, the Commissioners appointed under the Act aforesaid, replied to Complainant's letter of October 19, 1903, and said that they had nothing to do with the contract of July 1, 1882, and again asked Complainant if it would sell its plant and franchise, and if so, at what price. (Rec.,

p. 16). On April 27, 1904, Complainant in reply wrote the Commissioners that if the City concluded to buy its plant it could do so by having appraisers appointed who should fix the price, etc., (practically in accordance with the provisions of the contract of July 1, 1882,) and concludes by saying that it could not at that time name a fixed and specific price or the terms of payment. (Rec., p. 16-17). This ended the negotiations, and the Commissioners finding that their efforts to buy Complainant's plant were fruitless, reported to the City Council that they had been unable to obtain from Complainant a written proposition for the sale of its property, and further reported the estimated cost of constructing a new system of water works, the figures being less than the $750,000.00 which the Act of 1903 authorized to be expended for that purpose (Rec., p. 18).' Thereupon in accordance with the provisions of the said Act the City Council caused a vote of the people to be taken on the question of issuing said bonds for the purpose of building said water works, and the vote stood 1818 for the issuance of the bonds and 239 against the issuance of the bonds. (Rec., p. 19).

The City Council declared that the proposition to issue bonds and build an independent system of water works had carried by more than two-thirds of the votes cast, and was proceeding to let the contract to build the water works, and issue the bonds to pay for the same, when the injunction in this case put a stop to all further actions in that direction. (Rec., pp. 20, 24, 26). The Bill contains a minute historical account of the origin, growth, condition, circumstances, dealings and transactions of the Knoxville Water Company, and charges that if the City is permitted to build and operate its own water system, the result will be to destroy the value of Complainant's water system; reduce its income to a point where it will not pay operating expenses and fixed charges; confiscate and take its property and franchises without due process of law; and deprive it of the equal protection of the law in contravention of the 14th Amendment of the Constitution of the United States; impair the obligation of its contract with the City in contravention of Section 10, Article I, of the Constitution of the United States, and also of the Constitution of the State of Tennessee; and would be otherwise illegal upon other grounds not necessary to be now noticed. (Rec., p. 26).

The demurrer filed in behalf of the City of Knoxville raises two points, viz.: 1st, that the Court is without jurisdiction; 2nd, that none of Complainant's constitutional rights have been impaired. (Rec., pp. 84-85).

The Circuit Court overruled the first ground of demurrer and sustained the second, and the injunction was accordingly dissolved and the Bill dismissed. Complainant has appealed. (Rec., pp. 94-95).

The City of Knoxville has never in fact assumed to grant the Complainant the exclusive right to furnish the City and its inhabitants with water.

The contract between the City and the Complainant does provide that the City shall not grant "to any other person or corporation, any "contract or privilege to furnish water," for the period of thirty years, from August 1st, 1883. This language neither directly nor by implication contains any inhibition against the City itself in its municipal capacty from furnishing water for its own use and for that of its inhabitants. The thing, and the only thing provided against, is competition from individuals and other private corporations. The City had no legal right to exclude even these, as will be shown by authorities hereinafter cited, but it assumed to do so in terms by its contract. But the City did not assume to exclude itself from entering into competition with plaintiff, and if it had, its action would have been *ultra vires*, null and void. The very fact that the contract points out and specifies those who cannot exercise this privilege or franchise in competition with Complainant is an admission that such as are not thus pointed out and specified, may exercise said privilege or franchise. *Expressio unius est exclusio alterius.*

This principle was recognized by the Court in the case of Walla Walla vs. Walla Walla Water Co., 172 U. S., p. 15, where the City in granting a franchise to a water company contracted that it would not erect water works of its own, and the Court says: "this provision is "not devoid of an implication that it was intended to exclude only "competition from itself, and not from other parties whom it might "choose to invest with a similar franchise."

Jurisdiction.

Defendant's first ground of demurrer raises the question of jurisdiction. Both the Complainant and the Defendant are corporations organized under the laws of Tennessee, and are legal residents of that State. Before the Supreme Court can therefore take jurisdiction of a controversy between them it must appear that some constitutional question is properly raised. It is true that the decisions of this Court hold that the jurisdiction exists where the Bill claims in apparent good faith and not frivolously, that contract rights are impaired. But it is respectfully submitted that none of Complainant's rights are or can be infringed or impaired even although the contract may be exclusive in form, because such a contract is *ultra vires*, null and void.

The contract which Complainant claims has been impaired, does not either in terms or by implication, purport to be made by legislative authority or sanction. "A municipal ordinance not passed under sup-"posed legislative authority cannot be regarded as a law of the State "within the meaning of the constitutional prohibition against State "laws impairing the obligations of contracts."

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., p. 266.

"Before this Court can be asked to determine whether a statute "has impaired the obligation of a contract, it must be made to appear "that there was a legal contract subject to impairment, and some ground to believe that it has been impaired.

New Orleans vs. New Orleans Water Works Co., 142 U. S., p. 79.

The extent of the power conferred by the Legislature upon the City of Knoxville.

The present Charter of Knoxville, (Acts of the Legislature of Tennessee, 1885, Extra Session, Ch. 8, by Section 2), confers upon the City authority to erect water works, and by Section 18, under the head of general powers it is provided as follows: "the Mayor and Board of "Aldermen shall have the following powers by ordinance, * * Sec. "7. To provide the City with water by water works within or beyond "the boundaries of the City, or provide for supplying the City with

"water otherwise and to provide for the prevention and extinction of "fires and to organize and establish fire companies."

This Act being passed subsequent to the execution of the contract in question, cannot, of course, affect the rights of the parties thereunder.

Prior to 1882, the date of the contract, the rights, powers and authority of the City of Knoxville are embodied in various statutes passed by the Legislature of Tennessee, during the preceding period of about seventy-five years. These Acts so far as they bear upon the question at issue, are as follows:

By the Act of the General Assembly of Tennessee, passed January 19, 1838, entitled "an Act to incorporate the inhabitants of the town of Knoxville, in the County of Knox," Ch. 179, Sec. 3, it is provided as follows: "that the Mayor and Aldermen of said corporation be, and "they are hereby authorized to borrow a sum of money not exceeding "$50,000.00, for the purpose of erecting water works and supplying said "town with water, and the Mayor and Aldermen are hereby authorized "to make and issue the bonds and scrip of said corporation for the "payment of said sum of money."

The Act of the General Assembly of Tennessee, Chapter 18, p. 44, passed December 7, 1866, provides "that the Mayor and Aldermen of "the City of Knoxville shall have and exercise all the rights, powers, "authorities and privileges which have heretofore been conferred by law "upon th City of Nashville."

The City of Nashville by the Act of the General Assembly of Tennessee, Chapter 138, p. 270, passed January 31, 1848, was authorized by sub-section 8, of Sec. 6, "to provide the City with water by water "works within or beyond the boundaries of the City."

The City of Nashville by Ch. 69, of the Acts of 1857-8, p. 145, amending "an Act entitled an act to reduce the several acts incorporat- "ing the town of Nashville into one Act and to amend the same, passed "January 31, 1848," was empowered to "purchase, receive and hold "property, real and personal, beyond the limits of "the City to be used

"for the burial of the dead, *for the erection of water works*, for the "establishment of a hospital, for a poor house or house of correction, "or for a public park or promenade or for any other purpose that the "City Council may deem necessary and proper."

These acts which were the laws in force on this subject at the date of the execution of the contract with the Knoxville Water Company, if not by their express terms, certainly by implication limit the power of the City of Knoxville to the construction of municipal water works, and do not directly authorize said City to let a contract for the construction and operation of a water works system to outside persons, firms or corporations.

The Act with respect to Nashville (which also defines the power of Knoxville) places water works in exactly the same category as the City Hospital, poor house and house of correction, and is susceptible of no other meaning than that the Water Works must belong to the city the same as the other designated agencies.

In the case of National Foundry Work v. Oconto Water Company, 52 Fed. Rep. p. 29, it was held that the City of Oconto under the "general welfare" clause contained in its charter, had no power to confer a franchise for owning and operating water works, and for other things collateral thereto, on the ground that this power is of legislative origin and can only be exercised when expressly authorized by the supreme legislative power of the state.

The attention of the court is respectfully called in this connection to the authorities cited in the later portions of the brief to the effect that municipal corporations have and can exercise only such powers as are expressly conferred or necessarily implied. A strict application of this rule renders the action of the City of Knoxville in letting the contract for the construction of water works to the complainant, or its predecessors, absolutely null and void.

It is claimed that the general corporation law of the State of Tennessee of 1875, as amended in Chapter 104 of the Acts of 1877, under which complainant was chartered, conferred authority upon the City of Knoxville to make this contract. But all that law does or purports

to do, is to authorize and provide for the organization of private corporations. It was not intended, nor can it, we respectfully submit, be construed as an amendment to the municipal charters of the State. If that had been its purpose, why, when the present charter of the City of Knoxville was granted in 1885, is it therein specifically set forth that the city should have authority to provide water works and provide for the supplying of the city with water, and for the prevention and extinction of fires? If any water company incorporated under the Act (1875) would have the authority to enter into municipal corporations and erect and operate its plant without regard to the charter of such municipal corporation, what was the use of conferring again in express terms upon the City of Knoxville by a charter provision the authority to provide for water works? The same Legislature (1875) which passed the General Private Corporation Law, under which complainant was chartered, also passed a General Municipal Incorporation Law which provides in sub-section 15, of Section 13, Chapter 92, that municipalities organized thereunder have the right *"to provide the municipality with water by water works or otherwise, within or beyond the boundaries thereof."* The same Act in Sec. 14 and the Amendment thereof, in the Acts of 1877, Chap. 121, Sec. 1, provides that *"any municipality hereafter incorporated under a general or special law or laws of this State, may adopt the charter contained in Article 1, of this charter, provided a majority of those voting at an election to be held for such purpose, shall vote in favor of such adoption."* It is respectfully submitted that the case of Nichols v. Nashville, 9 Humph. 258, relied on by appellant as authority for the statement that a power may be conferred upon a municipality by an independent act incorporating a private corporation, is not authority for the rule this invoked. That decision merely holds that the legislature had the authority to authorize the City of Nashville to take stock in a railroad having one of its termini in that city, the same being a legitimate corporate purpose. It seems to us that the most that can be claimed for complainant's charter in this respect is that it confers the right upon municipalities to construct water works in such cases alone where municipalities have availed themselves of the privileges of incorporation granted by the same Legislature that granted complainant's charter.

In answer to Complainant's contention that even if the City did not have the right under its charter or the natural right under the general law to make the contract in question, that the charter of the Water Company conferred such a right, we have to say that *Complainant's charter does not purport to give an exclusive right.* On the contrary, said charter contains on its face the following limitation upon Complainant's powers, viz.: "*By no implication or construction shall said corporation be deemed to possess any powers except those hereby expressly given or necessarily implied from the nature of the business for which the charter is granted. (Rec. p. 30).*

A municipal corporation cannot grant an exclusive privilege or franchise unless it has express legislative power to do so.

The Charter of municipal corporations or the general law under which they exercise their powers, is their constitution in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers acting by a delegated authority; so that, while the State Legislature may exercise such powers of government, coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred and subject to such regulations or restrictions as are annexed to the grant.

Cooley's Con., Lim. p. 231, 4th Ed.

"Municipal corporations are created to aid the State government "in the regulations and administration of local affairs. They have only "such powers of government as are expressly granted them or such as "are necessary to carry into effect those that are granted. * * To the "extent of this authority they can bind the people and the property "subject to their regulation and government control by what they do, "but beyond their corporate powers their acts are of no effect."

City of Ottawa vs. Carey, 108 U. S., 110.

"A municipal corporation in the exercise of all of its duties,

"including those most strictly local or internal, is but a department of "the State. The legislature may give it all the powers such a being is "capable of receiving, making it a miniature State within its locality. "Again, it may strip it of every power, leaving it a corporation in name "only; and it may create and recreate these changes as often as it "chooses, or it may itself exercise directly within the locality any or all "the powers usually committed to a municipality. We do not regard "its acts as sometimes those of an agency of the State, and at others "those of a municipality; but that its character and nature remaining "at all times the same, it is great or small according as the Legislature "shall extend or contract the sphere of its action."

Barnes v. District of Columbia, 91 U. S., p. 540.

The powers exercised by all public corporations must be found in their charter which is based upon either a public or a special act.

Trustees Dartmouth College v. Woodward, 4 Wheat (U. S.) 518.

"A municipal corporation acts wholly under a delegated authority, "and can exercise no power which is not in express terms or by fair "implication conferred upon it."

Thomson v. Lee, 70 U. S. (3 Wall) 327.

"Counties, cities and towns are municipal corporations created by "the authority of the Legislature, and they derive all their powers from "the source of their creation, except where the Constitution of the State "otherwise provides."

Mount Pleasant v. Beckwith, 100 U. S., 524.

A public corporation is as already suggested, an artificial person, and as such capable of doing such acts and exercising such powers only as may be conferred upon it by the charter of its creation, or necessarily implied to carry into effect powers directly granted. The legal authority to execute a contract, therefore, lies at the basis of its validity; this may be found in charter, statutory or constitutional provisions and the absence of such authority acts as a limitation upon the right of the public corporation to contract. Contracts entered into without such authority or beyond the power of the corporation are necessarily void.

Persons dealing with public corporations are charged with notice of their rights to contract upon the subject matter and in the manner contemplated.

Abbotts Mun. Cor. Vol. 1, Sec. 249.

The case of Syracuse Water Co. v. Syracuse, 116 N. Y., p. 167 (5 L. R. A., p. 546), is quite similar to the case at bar. There the plaintiff was incorporated by the Legislature of New York in 1849, for the purpose of furnishing the City of Syracuse and its inhabitants with water. The charter provided that the Company should furnish the City with water for the extinguishment of fires and other purposes upon such terms as might be agreed on between them and that if necessary said terms should be fixed by Commissioners appointed by the Supreme Court; that in case the Company failed to furnish a wholesome supply of water within two years, upon notice and appraisement, the City should have the right to take over and become the owner of the water plant; that at any time after the expiration of twenty years the City should have the right to resume all the property rights, powers and privileges of the Company upon paying therefor in accordance with the provisions and methods pointed out by the charter. The City of Syracuse was proceeding to grant to the Central City Water Works Company the privilege of supplying the City with water when the Syracuse Water Company filed a Bill of Injunction based upon the impairment and invasion of its alleged exclusive right and franchise to furnish the City with water. The Court held that while when Plaintiff was granted its charter, the City had no other means or source of water supply in contemplation, and while Plaintiff had expended much money on its plant upon the faith of what it conceived its rights to be, that nevertheless in the absence of express charter or statute provision making the privilege exclusive, Complainant's rights were not impaired, and it could not maintain its injunction.

The case of Clarksburg Electric Light Company vs. Clarksburg, 47 West Va. 739, 50 L. R. A., 142, is strongly in point. There the town of Clarksburg on December 16, 1887, granted to the Clarksburg Electric Light Company the exclusive privilege for the term of twenty years to erect and operate electric light works. Under this grant said Com-

pany constructed a costly and valuable plant, and for a long time supplied the town and its inhabitants with electricity. In 1894 two other Electric Light Companies applied for and were about to obtain from the town of Clarksburg, authority to sell and supply electricity to the inhabitants thereof. Thereupon, the Clarksburg Electric Light Company relying upon its exclusive grant, sued out an injunction against the two new Companies and against the town of Clarksburg, restraining said Companies from furnishing electricity to said town and its inhabitants. The lower Court dissolved the said injunction, and the Electric Light Company appealed. The Supreme Court of Appeals of West Virginia held that under its charter provisions and the general statutes, the town of Clarksburg did not possess the power to grant an exclusive franchise to the Clarksburg Electric Light Company, and that a municipal corporation cannot grant an exclusive franchise unless it has received express power from the Legislature to do so.

The same principle was enunciated in the case of Walla Walla vs. Walla Walla Water Company, 172 U. S., p. 14, in this language: "had the privilege granted been an exclusive one, the contract might "be considered objectionable upon the ground that it created a monopoly "without an express sanction of the Legislature to that effect."

Monopolies may be created, but they can only be called into being by the sovereign power. Hence the exclusive franchises or privileges in the nature of monopolies cannot be granted by a municipal corporation, even where no express prohibition is found in its charter or Legislative Act applicable; for in no instance will such power be implied. Thus a municipal corporation cannot grant without authority from the Legislature in direct and express terms to any fuel or gas supply Company a monopoly of its streets, nor can such exclusive authority be granted to a railroad Company to lay its tracks in the streets. And while it has been held that the Legislature may grant such exclusive privilege, the weight of authority denies this power.

(McQuillin Mun. Ord. Sec. 190).

A town council in Rhode Island authorized by the statutes of that State to grant the right to lay water pipes and erect and maintain reser-

voirs upon such terms as it might deem proper, cannot grant to a Company the exclusive right to construct water works in the town. Nor does a town by giving a Company the use of the highways, as long as the inhabitants may be reasonably supplied with water, and exempting said Company from taxation and contracting that the Company shall sell its works to the town, exclude itself from constructing municipal water works.

Westerly Water Works Co. v. Westerly, 80 Fed. Rep. 611.

The principle laid down in these cases cannot be changed by reason of the fact that the City of Knoxville has acquiesced in the contract for a number of years, or that to allow the City to build water works of its own would work a hardship on Complainant by lessening the value of its plant and diminishing the amount of its income. As was said by the Court in the case of Westerly Water Works Co. v. Westerly, *supra*, "When we are dealing with questions of franchises or contracts wholly "or partly exclusive of public rights, we must adhere to the requirements "of clear and express legislative authority. To base such exclusive rights "upon a grant or contract of a body without authority, and then to ratify "and confirm such grant or contract by the mere silence of the public, or "by uncertain and ambiguous expressions, or by acts which may be "interpreted either as acquiescence or as mere sufferance, is to establish "a new source of grants in derogation of public right."

Id. 619.

The Supreme Court of Tennessee where the City of Chattanooga undertook by ordinance to grant to S. T. Wilcox and his associates the sole right to construct and operate a Telephone and Electric Plant for a period of twenty-one years, held upon suit brought by tax payers enjoining the City from carrying the said ordinance into effect that the Complainants were not entitled to the relief sought and used in passing the following language: "We shall enter into no discussion "of the power of the City to grant an exclusive franchise. It may be "admitted that no such power exists. But this gives no aid to Com- "plainants. The want of this power could only make the exclusive "feature invalid."

Patton v. Chattanooga, 108 Tenn., 229.

The same Court in case of Peoples' Passenger Railroad Company vs. City of Memphis, 3rd Shannon's Tennessee cases, page 193, holds that a municipal corporation has no power, in the absence of Legislative sanction or authority to enter into a binding contract with individuals or a private association for the construction and exclusive use and operation of street railways on and over the streets of the City for private profit.

The presumption is against the creation of an exclusive franchise and where the grant itself does not in terms confer conclusive rights, none will be implied.

Where the Legislature of New York passed an act authorizing the City of Brooklyn to condemn the property of the Long Island Water Supply Company for public use, and the Water Company resisted the right of the City to make said condemnation, this Court held that the City had the right to condemn, and that in a case where neither the statute under which the Water Company was organized, nor the contract with the town Company to furnish a water supply, nor the act annexing the said town to the City of Brooklyn, contained words of exclusion, such Company had no exclusive privilege and was not beyond the reach of the Legislative action. The Court in disposing of this proposition says:

"Grants from the public are strictly construed in favor of the "public, and grants of a privilege are not ordinarily to be taken as "grants of an exclusive privilege."

Long Island Water Supply Co. v. Brooklyn, 166 U. S., p. 685.

In the case of Skaneatales Water Works Company vs. Skaneatales, 184, U. S. 354, where the village of Skaneatales, by virtue of a statute of the State of New York, had granted to a water company the right to construct water works and supply water to the village and its inhabitants for a period of five years, and where, at the expiration of the five years the village constructed an independent system of water works of its own, whereupon the Water Company brought suit to restrain the further construction and operation by the village of said water works, on the ground that the village had impliedly contracted not to construct

water works of its own, this Court held: "there is no implied contract "in an ordinary grant of a franchise such as this, that the grantor will "never do any act by which the value of the franchise granted him in "the future will be reduced. Such a contract would be altogether too "far-reaching and important in its possible consequences in the way of "limitation of the powers of a municipality, even in matters not imme-"diately connected with water, to be left to implication. We think none "such arises from the facts detailed.

Skaneatales Water Works Co. v. Skaneatales, 184, U. S., p. 363.

Bienville Water Supply Co. v. Mobile 175 U. S., p. 109.

Where the City of Joplin was enjoined from supplying its inhabitants with incandescent lights by the Southwest Missouri Light Company upon the ground that said Company had been granted the right to erect and maintain an electric light plant for a period of twenty years which it had done at considerable expense, and that the City had within said period of twenty years entered into the business of commercial electrical lighting in competition with Complainant, and that the law authorizing said City to erect and maintain said plant impaired the obligation of Complainant's contract with the Company, and deprived the said Company of its property without due process of law, this Court held that "the limitation contended for is upon a governmental agency and restraints upon said agency must not be readily "implied. The Appellee consents, as we have seen that it has no exclusive right, and yet contends for a limitation upon the City which might "give it (the appellee) a practical monopoly. Others may not seek to "compete with it, and if the City cannot, the City is left with a useless "potentiality while the appellee exercises and enjoys a practically exclu-"sive right. There are presumptions, we repeat, against the granting "of exclusive rights and against limitations upon the powers of "government."

Joplin v. Light Co., 191 U. S., 150, 156-157.

This Court in the recent case of Helena Water Works Company v. Helena, 195 U. S., p. 383, referring to the three cases above cited, thus restates the principles therein enumerated, viz.: "These cases hold

"that the grant of the franchise does not of itself raise an implied "contract that the grantor will not do any act to interfere with the "rights granted to the Water Works Company, and that in the absence "of the grant of an exclusive privilege, none will be implied against "the public, but must arise, if at all, from some specific contract "binding upon the municipality." Under the ordinances passed by the City of Helena it was expressly provided that nothing therein contained should be so construed as to give the water company or its successors the exclusive right of occupying streets or the exclusive right of distributing or selling water through said City. It was further provided that during the term of the agreement, which was twenty years, that the Company should provide all the inhabitants of the City with a full ample and sufficient supply of water. The City was enjoined from erecting a plant of its own upon the ground that the Water Company was obligated to furnish water to the City and its inhabitants for twenty years, and that this contract would be impaired, and its benefits to the Company destroyed, if the City should erect an independent plant of its own. The Court denied the Complainant's contention and among other things held as follows: " * * * Had it been intended to exclude "the City from exercising the privilege of establishing its own plant "such proposition could have been expressed by apt words. It is "doubtless true that the erection of such a plant by the City will render "the property of the Water Company less valuable, and perhaps unpro-"fitable, but if it was intended to prevent such competition, a right to do "so should not have been left to argument or implication, but made "certain by the terms of the contract. The privilege of building other "works was, in the absence of some binding contract forbidding the "exercise of the power, clearly within the City's constitutional and "statutory rights. We cannot find that the City has precluded itself "from exercising this right by anything shown in this case."

"The State, it is presumed, has no favors to bestow, and designs "to inflict no arbitrary deprivation of rights. Special favors are always "obnoxious, and discriminations against persons or classes are still more "so; and as a rule of construction, it is to be presumed that they were "probably not contemplated or designed. * * * Grants, however, which confer upon a few persons what cannot be shared by the many,

"and which, though supposed to be made on public grounds, are never-"theless frequently of great value to the corporators, and therefore "sought with avidity, are never to be extended by construction beyond "the plain terms in which they are offered. * * * * The just pre-"sumption in every such case is that the State has granted in express "terms all that it designed to grant at all."

Cooley's Constitutional Limitations, p. 493-495, 4th...Ed.

"Doubts as to what is granted are resolved in favor of the grantor, "or, as aften epigrammatically said, 'a doubt destroys a grant.'"

Jackson Horse Railroad Co. v. Interstate Rapid Transit Railway Co. 24 Fed. Rep. 306.

The Supreme Court of Tennessee has declared that where an exclusive right or privilege is claimed, nothing is to be taken as conceded, but what is granted in unmistakable terms.

Turnpike Co. v. Montgomery County 100 Tenn. p. 417

This Court as far back as the well known case of Charles River Bridge Co. vs. Warren Bridge Co. 11 Peters 545, gave expression to the same principle in the following terse sentence: "In grants by "the public nothing passes by implication."

The public is favored by the Courts where questions of this character arise.

In the case of Stein vs. Bienville Water Supply So. 141 U. S. p. 67, it appeared that Stein by a contract with the City of Mobile made in 1840,(and confirmed by an act of the Legislature passed January 7, 1841, acquired the exclusive right to supply the City of Mobile and its people with water "from the Three Mile Creek" for a designated term of years, and until the city should pay him his heirs, executors and assigns the actual value of said water works, as determined in the mode pointed out by the contract. By an act of the Legislature of Alabama passed in 1883 the Bienville Water Supply Co. was incorporated for the purpose and with the exclusive right for twenty years of supplying from any point "other than Three Mile Creek," such pure water as the domestic sanitary and municipal wants of Mobile might require. Stein, in

good faith, out of his means and with borrowed money, had expended more than $200,000.00 in the construction of a water works system which he kept in good order and condition, and thereby supplied the city of Mobile and its inhabitants with water. In a suit brought by Stein to enjoin the Bienville Company, it was held that Stein's exclusive privilege was limited to taking and furnishing water from "Three Mile Creek" and that "we are forbidden to hold that a "grant under legislative authority, of an exclusive privilege, for a term "of years, of supplying a municipal corporation and its people with "water drawn by means of a system of water works from a particular "stream, prevents the State from granting to other persons the privilege "of supplying, during the same period, the same corporation and people "with water drawn in like manner from a different stream or river."

In the case of Hamilton Gas Light Co. vs. Hamilton, 146 U. S. p. 258, the facts show that the Gas Company was incorporated under the general statutes of Ohio of 1852 with authority to lay pipes and furnish gas for public or private purposes. By an ordinance of the City of Hamilton passed in 1855 the Hamilton Gas Light Company was given the exclusive privilege of laying pipes, etc., for the period of twenty years. This contract was renewed at different times but in January, 1889, the City Council passed a resolution reciting the termination of the last contract, and that it would not thereafter pay said company for any lighting and the company was forbidden the use of the lamp-posts of the city. Immediately thereafter the city, acting under the authority of the Revised Statutes of Ohio, took steps to issue bonds for the purpose of erecting gas works of its own. Thereupon the company brought suit to perpetually enjoin the city from disconnecting the company's mains from the lamp-posts, and from issuing bonds for the purpose of erecting a municipal gas plant. The court uses this language in denying plaintiff relief, "it may be that the erection and maintenance "of gas works by the city at the public expense and in competition with "plaintiff, will ultimately impair, if not destroy, the value of plaintiff's "works for the purposes for which they were established. But such "considerations cannot control the determination of the legal rights of "the parties. Nor does every statute which affects the value of a con-"tract impair its obligation. It is one of the contingencies to which par-

"ties look now in making a large class of their contracts, that they may "be affected in many ways by State and national legislation."

"If parties wish to guard against contingencies of that kind, they "must do so by such clear and explicit language as will take their con- "tracts out of the established rule that public grants susceptible of two "constructions must receive the one most favorable to the public."

Hamilton Gas Light Co. v. Hamilton, 146 U. S. 963.

Appellants Contentions.

It is not pretended that all exclusive grants of franchises of this character are invalid. This Court in the case of New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., p. 650, sustained an extension of twenty years of an exclusive grant to a Gas Company. And an exclusive grant for fifty years to a water company, was held valid in the cases of New Orleans Water Works Co. vs. New Orleans, 115 U. S., 674, and St. Tammany Water Works Co. vs. New Orleans, 120 U. S. 64. It was also held that an exclusive franchise to the Louisville Gas Company for twenty years was good in the case of Louisville Gas Company vs. Citizens Gas Company, 115 U. S., p 683. And in the case of Walla Walla vs. Walla Walla Water Co., 172 U. S., p. 1, it was held that a contract granting to a water company the privilege of furnishing water to the City of Walla Walla and its inhabitants for twenty-five years and an undertaking on the part of the City not to erect or become interested in any other water works was lawful. *But in every instance above cited, the authority to make the contract and grant the franchise, was expressly conferred by the Legislature."*

It is contended that the rights of the parties to this suit must be determined by the same rules that would be available to private individuals in cases of like character, but such is clearly not the law. *"Persons dealing with public corporations are charged with notice of their rights to contract upon the subject matter, and in the manner contemplated." (Abbott's Municipal Corporations supra.)" If there is no legal authority for the contract, that authority cannot be created through the application of any doctrine or principle of estoppel, acceptance or ratification. The contract cannot be enforced. (Id. Vol. 1, Sec. 280.)*

In the case of *Nashville v. Hagan, 9 Bax. (Tenn.) 495*, the Supreme Court of Tennessee held that the City of Nashville was not liable for the price of certain material, bought and used by it for the improvement of its water works system, because the contract therefor was made without authority, and because there was no general law or ordinance authorizing the execution of said contract.

And as was held in the case of *Westerly v. Westerly, supra, If a contract which a municipal corporation had no power to make in the first instance, should be held good upon the doctrine of estoppel or acquiescence, a new power other than the Legislature would then accomplish by indirection that which the law expressly declares cannot be accomplished by direction.*

Complainant's contention with respect to its contracts with North Knoxville and West Knoxville, and the assumption of said contracts by the City of Knoxville, is unsound. Under its contract with North Knoxville complainant undertook to supply said town and its inhabitants with water until June, 1913. Under its contract with West Knoxville the Lonsdale-Beaumont Water Company undertook to supply said town with water for twenty years from September 17, 1892. Under the Act 1897 consolidating North Knoxville and West Knoxville with the City of Knoxville, the latter obligated itself to carry out and perform all lawful contracts of the two first named towns. The water contracts of these two towns may have been lawful, but they were certainly not exclusive either in terms or intention, and there is nothing in either of them which would prohibit the City of Knoxville from building and operating a water plant of its own under the well settled doctrine laid down in *Joplin v Light Company*, and *Helena v. Helena Water Company*, and other cases cited above.

Complainant cannot sustain or strengthen its position by relying upon the holdings of the Chancery and Supreme Courts of Tennessee, in the suit it brought and maintained to collect hydrant rentals in the year 1885. The city having used the Complainant's water was bound on the plainest principles of equity to pay for the same, and the questions raised in that case were upon an entirely different issue from the issues here raised, and do not appear to have been the same or

similar in any respect to those raised in this case. Neither in that case nor in the rate case also relied on, was the right of complainant and the city to make the contract in the first instance, drawn in question.

Com plainant's effort to distinguish between an exclusive right or contract or easement granted to a street railroad company and to a water works company is not successful. The fundamental objection to all contracts of this character is that they are exclusive and prejudicial to the public, and it can make no difference whether the question arises between a railroad company, gas company or water company, or any other public service corporation. That the exclusive feature of contracts of this character is obnoxious to the spirit of the law is too well established by the cases already cited to need further comment. It is true that complainant's charter gave it the right to lay down pipes through the streets, lanes and alleys of the city. But this charter could not enlarge, limit or affect the city's powers. And it is respectfully submitted that complainant without a special permit from the city designating which particular streets, lanes and alleys it might operate in, would have no rights of any sort in said streets and would be a mere trespasser.

It is claimed that complainant's charter and its contract with the defendant have been recognized and approved by the Legislature of Tennessee in Chapter 12, of the Acts of 1903. This Act was passed for the purpose of authorizing the City of Knoxville to issue bonds in order to provide a fund for the purchase of complainant's plant, and it was passed on January 29, 1903, and was repealed by the same Legislature on March 31, 1903. There is no ratification in this Act of complainant's contract. It is merely recognized as a necessary incident to the main purpose of the statute which was to provide a fund with which to pay for the water works upon an agreed valuation. It is not doubted but that the Legislature may validate contracts which are illegal on account of the failure of the parties to comply with some statutory requirements, (See Butler v. Building & Loan Ass'n. 97 Tenn. 679, and Swope v. Jordan, 107 Tenn. 166). But in these cases the validating act in express terms declared that the contracts in question should be as valid and binding in all respects as if

there had been an original compliance with the statutes governing such cases. A mere reference to a contract by the Legislature, it is respectfully submitted, cannot be construed into a construction of the contract, or into a declaration of the power of the parties to enter into it in the first instance.

Under the rule that municipal corporations can exercise no power which is not in express terms or by fair implication conferred upon it, it is submitted that a mere recognition by the Legislature of a contract entered into between a municipal corporation and a water company will not suffice to clothe it with the authority which was lacking in the first instance. The Legislative ratification of a contract without evidence that such ratification was procured with the assent of the city, or had been subsequently acted upon, does not make the contract obligatory upon the city. (*Hasbrouk v. Milwaukee, 13 Wis. 37.*) The Chief Justice of Wisconsin in delivering the opinion in this case says: *"The question is, can the Legislature by recognizing the existence of a previously void contract and authorizing its discharge by the city, or in any other way coerce the city against its will into a performance of it, or does the law require the assent of the city, as well as of the Legislature, in order to make the application binding and efficacious?. .I must say that in my opinion the latter act as well as the former, is necessary for that purpose, and without it the application cannot be enforced.. * * * And to admit that the Legislature, of its own choice and against the choice of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to divest settled rights of property and to take the property of one individual or corporation and transfer it to another."*

The case of Walla Walla v. Walla Walla Water Company so strenuously relied on by appellant, we also invoke as an authority in support of appellees' position. The court expressly declares in its opinion, that the case upon its merits depends largely upon the power of the city under its charter, and that is expressly what we contend for in this case. The court held in the Walla Walla case that the city had the charter power to make the contract it did make. In the case at bar there is no such power given in express terms, and the implication

is against it. In the Walla Walla case the city when enjoined was proceeding to erect a system of water works of its own in the face of a positive provision in its contract that it would not, as a city, enter into competition with the water company. In the case at bar there is no such provision. On the contrary the competition which the contract protects the water company from is that of other persons or corporations. This omission of the city to designate itself raises an implication that it was intended to exclude others and not itself from competition with the appellant.

In the case of Red River Bridge Company vs. Mayor and Aldermen of Clarksville, (I Sneed, 176,) the Supreme Court of Tennessee held that "a grant by charter from Legislature of an exclusive right to build a toll-"bridge within certain limits, although a contract, is such an exclusive "right as must yield to the public interest, and the franchise acquired "under it may be taken for the public use, upon just compensation being paid "therefor, without violating said contract or impairing its obligation in the "sense of the Constitution."

The same doctrine is announced in the case of Turnpike Company vs. Davidson County, 106 Tennessee, p. 258.

Where the Memphis Gaslight Co. was chartered by the Legislature of Tennessee in 1851, and was given "the privilege of erecting, establishing "and constructing gas works and manufacturing and vending gas in the "City of Memphis by means of public works for the term of fifty years "from and after the date of this act," the Supreme Court of Tennessee held that "there is not only no language in the Statute which directly con-"fers an exclusive right upon the Company, but there is none from which "an exclusive right can be implied."

Memphis Gayoso Gas Co. v. Williamson, 9 Heisk, p. 314.

A grant of a right to occupy the streets of the City of Knoxville with the lines of a Street Railway cannot be conferred by ordinance alone, and if conferred by charter is inoperative until assented to by valid ordinance. A charter right without an ordinance applying it, is inoperative, and an ordinance not based upon and conforming to the charter is void.

Citizens Railway Co. v. Africa, 100 Tenn. p. 26.

Complainant lays great stress upon its right under its charter. But when it accepted said charter it did so with the full knowledge conveyed by its express terms and language, that *"the right is reserved in the "Legislature to repeal, annul or modify this charter."* (Rec. p. 30.) The Act of 1903, Chapter 153 which is attacked by Complainant as

impairing the obligation of its contract, is simply an exercise of the right reserved by the Legislature in Complainant's charter to modify the same.

And since Complainant alleges that Defendant's proposed action will make it impossible for Complainant to meet its fixed charges, it may not be out of place to call the Court's attention to the method by which one of these fixed charges was created. By an amendment to Complainant's charter (Rec., p. 32), Complainant is prohibited from issuing bonds in excess of $150,000, and said amendment further declares that *"all bonds issued in violation of this provision as to said corporation "shall be utterly null and void; shall not be obligatory upon said Corpo- "ration as a debt, nor in any way constitute a charge upon its property, "real or personal, but shall be only the personal and individual liabilities "and obligations of the officers and stockholders actually participating "in such wrongful issuance of the same."* Whereas Complainant shows in its Bill that by simple contract it assumed the right, in violation of this express provision of its charter, to issue prior to the first day of January, 1901, $800,000 of bonds (Rec., p. 11).

We cannot better close this brief than by quoting from the opinion of the learned Judge who decided this case below, as follows: *"I "conclude that if the City of Knoxville had expressly inserted in the "contract a stipulation that it would not itself during the contract with "the Complainant Company erect and operate a water works plant, and "further that it would not contract with or grant the right to others to "do so, and had attempted in that way expressly to make the rights "granted to the Complainant Company exclusive, that such a particular "stipulation in the contract would have been invalid for want of Legisla- "tive authority to do so, and not because there would have existed "constitutional objection to such a provision. * * * I conclude "that when the Legislature of the State has not in the franchise grant "made the use and occupation of the streets exclusive for a term of "years, nor expressly authorized the municipal corporation to do so, "that the latter is without authority to do so, and that an express pro- "vision to that effect inserted in its contract would be invalid."*

There is no other error in the decree of the lower court, and it should be affirmed. Respectfully submitted,

J. W. CULTON,
JOHN W. GREEN,
Solicitors for Appellees.